



OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 316

RIN 3206-AN92

Temporary and Term Employment

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations that would allow agencies to make term appointments in certain Science, Technology, Engineering, and Mathematics-related (“STEM-related”) occupations for up to 10 years. OPM is issuing final regulations to provide agencies with greater flexibility to staff foreseeably long-term projects of a STEM-related nature when the need for the work is not permanent. The intended effect of this change is to allow agencies the flexibility and discretion to hire individuals with knowledge, skills, and abilities tailored to a specific project that may not be required on a permanent basis or transferable to other functions of the agency. This longer-term appointment may also assist agencies in recruiting individuals with certain specialized knowledge, who may be interested in acquiring further skills and experience working on a project basis and would be less likely to pursue or accept a career position. This authority is not intended to be a substitute for regular agency hiring but is instead intended to be a supplement to existing hiring authorities that is targeted for longer-term projects that are not permanent in nature. This appointment authority provides no authority for noncompetitive conversion into a permanent competitive service position.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

Responses to Comments on the Proposed Rule

On September 14, 2020, the Office of Personnel Management (OPM) published proposed regulations in the *Federal Register* at 85 FR 56536 to allow agencies to make term appointments in certain STEM occupations; positions needed to stand-up, operate, and close-out time-limited organizations which have a specific statutory appropriation; and time-limited projects which have been funded through specific appropriation for up to 10 years at part 316 of title 5, Code of Federal Regulations (CFR). OPM received 12 comments on the proposed rule: four from individuals, six from other commenters, and two sets of comments from two Federal Employees Unions.

Based on our review of the comments and upon further consideration, OPM has decided to limit application of this ten-year term authority to certain STEM-related occupations enumerated below. OPM's determination is based on several factors.

- First, as illustrated by the public comments, the most significant demand for the ten-year term authority is for STEM-related occupations. This authority is an exception to current, long-standing regulations, which require agencies to seek OPM authorization to make initial appointments to terms that exceed four years, or to extend initial four-year term appointments. Historically, OPM has received very few requests for initial appointments beyond four-years. Based on agency input, there is a growing demand for longer term appointments tied to certain STEM-related projects. Accordingly, OPM has determined that it will scope this authority to the most common demand expressed by agencies—to support STEM-related projects that are time-limited in nature but are expected to last beyond four years.
- Second, some of the public comments on the proposed regulation argued that OPM should not move forward with this ten-year term authority at all. Those comments expressed concerns about potential for abuse or adverse effects on employees of

widespread use of this appointing authority. Though we are not aware of any documented instances of abuse or adverse effects, we take seriously our role in protecting merit system principles, and we appreciate the concerns expressed in these comments.

We therefore have decided that, because this is a new delegation of authority, it is prudent to evaluate how it will be applied to a subset of occupations—namely, STEM-related occupations— before extending it further. The final rule therefore does not include positions needed to stand-up, operate, and close-out time-limited organizations which have a specific statutory appropriation or positions related to time-limited projects which have been funded through specific appropriation.

- Third, OPM views the new ten-year term authority as a version of a delegation of authority to agencies. Currently, agencies must seek authorization from OPM in advance of using initial term appointments of more than four years or extending initial term appointments beyond four years. A 2021 report of the National Academy of Public Administration (NAPA), commissioned by Congress, recommended (among other things) that OPM shift to a risk-based approach to human resources transactions, which includes delegation of certain transaction functions, subject to periodic OPM oversight. In furtherance of this recommendation, we believe that an initial delegation to agencies of the authority to make initial appointments of up to ten years for certain STEM-related occupations is prudent. The scope of these regulations will allow for a number of STEM-related positions to be filled via term appointments of up to ten years, which will allow OPM to evaluate agencies' use of the longer term appointment authorities and the resulting impact on the Federal workforce. To date, we are aware of no documented evidence of abuse of a similar authority that the Department of Defense holds. Accordingly, delegating this authority to agencies subject to OPM oversight is in line with the NAPA report's recommendation of applying a risk-based approach to delegations of transactional HR activities.

- Fourth, as indicated above, OPM has determined that scoping this authority to certain STEM-related occupations is in the best interests of the efficiency of the service. In scoping this authority to those occupations, we note that the nature of work can be project-based and people performing those functions move among employers more regularly. Because of the project nature of this work, the use of contractors by Federal agencies is more prevalent in those fields. By expanding the term appointment authority to ten years for STEM-related positions, agencies will now have a more streamlined option to use Federal employees, in addition to or instead of contractors, for longer-term projects.
- Fifth, we note that even though we are narrowing the scope of this authority from what was initially proposed, agencies continue to have the ability to appoint employees for terms of up to four years, and can request a longer initial term, or an extension, from OPM (see 5 CFR 316.301(b)). When an agency needs to request an initial term appointment to fill a position or group of positions in excess of 4 years, the agency needs to provide OPM with the following information: the position title(s); occupational series; and grade level(s); the geographic location(s) of the position; a description of the work to be performed by the position incumbent(s); and a statement explaining why the agency expects the work to last longer than 4 years. The last item should include any applicable timelines, the length of time the agency expects the work to last, and any other information the agency believes is relevant to its request. To further assist agencies, OPM intends to develop guidance (i.e., templates) for agencies to use when submitting their requests for an initial term appointment beyond the current 4-year limitation. If we see an increased demand from agencies for longer term appointments in occupations not covered by this final rule, and we see no significant abuse or negative effects on the Federal workforce from this delegation, we will consider expanding the scope of occupations in the future.

Our responses to specific comments are below.

One individual commented that 10-year term appointments would likely be of interest to political appointees desiring to “burrow” into the competitive service and recommends OPM expand its oversight responsibilities with respect to political appointees, to include this authority. While a political appointee is not excluded from fair consideration for a non-political position in the Federal Government, we agree with the suggestion to expand OPM’s oversight and, upon issuance of this regulation, OPM will amend its guidance to agencies and add the requirement that review will be required before an agency may place a political appointee in a position covered by this rule. Additionally, OPM will conduct oversight of the 10-year term hiring authority for certain STEM-related occupations, to ensure the appropriate use and intent of this hiring authority. In addition, Enterprise Human Resources Integration (EHRI) data will allow OPM to review the number of term appointments made to the positions covered by this authority.

Another individual requested OPM clarify whether agencies can use this authority to fill positions in the Senior Executive Service (SES). The 10-year term appointment authority is not available to fill positions in the SES, as it applies only to covered positions filled in the competitive service under 5 CFR part 316. Senior Executives are appointed to the SES, which is separate from the competitive service and the excepted service. See 5 U.S.C. 2101a, 2102, and 2103.

Another individual expressed concern over term employees’ health and safety, as well as their workload burden. This individual also stated that term employees should have a basic right to health and safety and an earned right to apply for any permanent position at any time. The first comment is beyond the scope of this rulemaking as it appears, in context, to be a specific complaint against the commenter’s employing agency that is not related to creation of a new 10-year term appointment authority. With respect to permanent positions, term appointees always have the right to apply for positions open to all U.S. citizens, and nothing about the new 10-year term appointment authority limits those rights. There is no right to a non-competitive conversion

to a permanent Federal job, as explained in 5 CFR part 316, and we do not intend to change that rule for purposes of these appointments, which are expressly intended to be time-limited appointments designed for project work related to certain STEM-related fields. We do note that some individuals hired under these rules may be eligible for non-competitive conversion if they are subject to such statutory provisions as the Land Management Workforce Flexibilities Act, or 5 U.S.C. 3112 pertaining to disabled veterans.

One individual suggested OPM simplify the steps to renew multi-year appointments, and that supervisors should be made aware of appointment deadlines. This individual also asked whether employees appointed under these rules would be eligible for promotion, and whether employees could apply for permanent Federal jobs, and be considered as internal agency employees when doing so. OPM is unclear as to whether these comments were aimed at Federal contractors or Federal employees appointed under 5 CFR part 316 because the individual referred to employee “contracts.” To be clear, these rules apply to individuals appointed under 5 CFR part 316 (i.e., Federal employees). OPM believes the proposed rule on extending appointments is clear: “An agency may extend an appointment made for more than 1 year but fewer than 10 years up to the 10-year limit in increments determined by the agency. The vacancy announcement must state that the agency has the option of extending a term appointment under this section up to the 10-year limit.” The manner in which agencies choose to notify supervisors of appointment deadlines is within the agencies’ discretion and, therefore, beyond the scope of these rules. Individuals serving on term appointments under this authority may be promoted, in accordance with 5 CFR 335.102(e), provided the vacancy announcement specified the possibility of promotion. In addition, under long-standing policy, individuals may apply and be selected for new term appointments following the expiration of their existing term. Lastly, as discussed above, any term employee appointed under 5 CFR part 316 may apply for a permanent position. In general, a term appointment (no matter the duration) does not provide

incumbents with competitive status in order to be considered as an internal employee or a “status” candidate for purposes of applying for a permanent position in the competitive service.

Two commenters stated they concur without comments or recommendations to the proposed rule.

Another commenter suggested OPM modify the proposed rule to allow for a one-time extension (beyond the 10-year limit) by OPM for 1 additional year to accommodate time-limited organizations and/or time-limited projects appropriated for additional funding by Congress. A different commenter also commented it was unclear as to what type of positions can be used for positions needed to stand-up, operate, and close-out time-limited organizations which have specific statutory appropriation, or time-limited projects which have been funded through specific congressional appropriation.

These comments were based on OPM’s proposal to allow agencies to use the 10-year appointing authority for positions needed: to stand-up, operate, and close-out time-limited organizations which have a specific statutory appropriation; or for time-limited projects which have been funded through specific congressional appropriation.

As discussed above, however, OPM is not extending the use of this appointing authority to those positions (unless the work to be performed by a time-limited organization, or a time-limited project funded through specific appropriations, requires the use of a covered STEM-related position).

Two commenters recommended OPM define which positions are considered STEM positions for purposes of these rules. OPM is adopting this recommendation. OPM is limiting the use of this authority to fill positions in the following STEM-related series and occupations: positions in the Social Science Series, 0101, Economist Series, 0110, Psychology Series, 0180; occupations in the Natural Resources Management and Biological Sciences Group (i.e., 0400 group); occupations in the Medical, Hospital, Dental, and Public Health Group (i.e., 0600); occupations in the Physical Sciences group (i.e., 1300 group); occupations in the Engineering

and Architecture group (i.e., 0800 group); occupations in the Mathematical Sciences group (i.e., 1500 group); and occupations in the Information Technology group (i.e., 2200 group). These occupations are defined in OPM's Handbook of Occupational Groups and Series at <https://www.opm.gov/policy-data-oversight/classification-qualifications/classifying-general-schedule-positions/occupationalhandbook.pdf>.

OPM has decided to make this new authority available to fill positions in the above-listed occupations. As noted by these commenters, agencies need clarity as to which positions are covered by this new rule. And, as discussed previously, the strongest interest is for occupations necessary to deliver STEM-related projects of a time-limited nature. OPM assessed which particular occupations are most necessary to supporting the delivery of these time-limited STEM-related projects. While we recognize that any occupation in government could arguably be connected in some way to STEM-related projects, we wanted to tailor the rule to the most essential occupations. They include not only positions that might generally be known as "STEM" occupations, but also certain related occupations that are important to successful delivery of STEM-related projects. Accordingly, the covered job series and occupations in the final rule are those that OPM believes are most necessary to STEM-related projects across the Federal landscape that may entail work of a non-permanent duration lasting more than 4 years. By tailoring this new authority to the occupations necessary to deliver on longer-term STEM projects, the final rule carefully balances competing interests by responding to commenters who have concerns about the scope of the new authority while also offering agencies a new authority for the circumstances where they expressed the greatest need.

A different commenter suggested OPM identify STEM positions by series to limit confusion as to which occupational series are covered under these rules, and further suggested that OPM should clarify whether these rules apply only to STEM positions or also to positions that support STEM positions. As noted, OPM is adopting this suggestion and is limiting the use of this hiring to the Social Science Series, 0101, Economist Series, 0110, Psychology Series,

0180; and 6 occupational groups for positions in the 0400, 0600, 0800, 1300, 1500 and 2200 job series.

The same commenter asked OPM to clarify the types of situations in which term appointments could be extended beyond 4 years without OPM approval. Term appointments made pursuant to 5 CFR 316.301(a), i.e., for a period of more than 1 year but not more than 4 years, require OPM approval in order to extend beyond 4 years in accordance with 5 CFR 316.301(b). Pursuant to this rulemaking and in accordance with 5 CFR 316.301(c), an agency may extend an appointment made for fewer than 10 years up to the 10-year limit in increments determined by the agency without OPM approval. The vacancy announcement must state that the agency has the option of extending a term appointment under this section up to the 10-year limit.

The same commenter asked OPM to clarify whether positions needed in support of time-limited organizations or time-limited projects funded by Congress filled under this authority are limited to STEM occupations. As described above, OPM has decided to limit use of this authority to the following positions: Social Science Series 0101, Economist Series 0110, Psychology Series 0180, and the 0400, 0600, 0800, 1300, 1500 and 2200 occupational groups. The final rule authorizes agencies to use this authority to fill positions needed in support of time-limited organizations, or time-limited projects funded by Congress only if the projects or work of the time-limited organization requires the use of STEM-related covered position(s).

This commenter also recommended OPM clarify in the final rulemaking that this authority may include positions with work in a variety of professional and technical areas, including but not limited to: environmental and biological sciences; medical, dental, and public health; mechanical and biomedical engineering; information technology and systems management; and actuarial and statistical mathematics. As explained above the final rule applies to all positions in the Social Science Series 0101, Economist Series 0110, Psychology Series, 0180, and occupational groups 0400 (Natural Resources Management and Biological Sciences

Group), 0600 (Medical, Hospital, Dental, and Public Health Group), 0800 (Engineering and Architecture Group), 1300 (Physical Sciences Group), 1500 (Mathematical Sciences Group), and 2200 (Information Technology Group). For positions not covered, OPM notes that current rules in part 316 subpart C can be used to make initial term appointments in excess of 4 years upon request and contingent on OPM approval. As previously stated, OPM will develop guidance to assist agencies with making requests for initial term appointments for more than 4 years.

This commenter asked OPM to clarify the mechanism for agencies to use in identifying a 10-year term appointment under these rules as compared to the existing 4-year term appointments made under 5 CFR 316.301(a). This commenter asked if OPM will provide a new legal authority and remark code to document the appointments under the 10-year rule on the Standard Form (SF) 50. Appointments made under these provisions are made pursuant to 5 CFR 316.301(c), while a 4-year term appointment is made under 316.301(a). OPM will provide agencies with a new legal authority code and instructions for documenting appointments made under this delegation of authority.

The same commenter asked whether OPM intends to change 5 CFR 831.201(a)(14) to allow retirement benefits for term employees under this authority. This comment is beyond the scope of this rulemaking which pertains to the duration of term appointments. We do note that, in general, term appointments are excluded from coverage under the Civil Service Retirement System (CSRS) but, generally, are subject to the Federal Employees Retirement System (FERS). OPM encourages readers to visit: <https://www.opm.gov/retirement-services/> for more information about whether and how service under a term appointment is creditable for purposes of Federal retirement.

The commenter also asked whether individuals hired under this authority will be eligible for non-competitive conversion to a permanent position in the competitive service. As noted above, in general, individuals hired under this authority, or other term appointments, are not

eligible for non-competitive conversion to a permanent Federal job. Only Congress, or the President by executive order, can establish non-competitive entry into the competitive service.

This commenter suggested OPM clarify that, if funding comes from grants or industry resources (i.e. funded by non-Congressional appropriations), this authority cannot be used to fill positions needed to stand-up, operate, and close-out time-limited organizations; or for time-limited projects. As stated previously, OPM is not extending this authority to such positions (unless the work to be performed requires the use of a covered STEM-related position).

Lastly, this commenter suggested no appointments should be extended beyond the 10-year limit. OPM agrees with this comment. No appointments made under this hiring authority can be extended beyond the 10-year limitation.

A different commenter asked whether individuals currently serving on term appointments pursuant to 5 CFR 316.301(a), i.e., not to exceed 4 years, could be extended for up to 10 years under these provisions. The commenter asked whether a new job announcement would have to be issued in order to retain individuals currently appointed under 5 CFR 316.301(a). The commenter also asked whether time spent on a current term appointment (i.e., not to exceed 4 years), including any extensions by OPM, would count against the 10-year limit under the 10-year appointment rule. Appointments pursuant to 5 CFR 316.301(a), i.e., for a period of more than 1 year but not more than 4 years, cannot be extended by these provisions. Four-year term appointments and 10-year term appointments are two separate categories of term employment. Agencies seeking to extend individuals beyond their 4-year limitation must seek OPM approval in accordance with 5 CFR 316.301(b). An agency seeking to fill a term position for up to 10 years in accordance with these rules must advertise the position consistent with public notice requirements and in accordance with 5 CFR 316.301(c). No appointment may be extended beyond the 10-year limitation when making appointments under the 10-year term hiring authority for certain STEM-related positions.

The same commenter requested that OPM consider a regulatory change that would allow for 10-year competitive temporary promotions. OPM is not adopting this suggestion because it is beyond the scope of this rulemaking.

The same commenter suggested OPM broaden the proposed rule to include mission critical non-STEM-related occupations. OPM is not adopting this proposal because we do not have evidence to support the need for a 10-year term appointment covering any and all positions that would be considered “mission-critical.”

This commenter questioned whether it could identify highly qualified applicants for positions filled under these rules. The agency also noted that filling positions under this provision could create retention issues, citing pay equity with other employment sectors as well as the lack of permanent job security and retirement benefits as potential challenges to retention. This authority is not intended to be a substitute for regular agency hiring but is instead intended to supplement existing hiring authorities. OPM proposed these rules to assist agencies in attracting individuals to time-limited STEM-related project work by giving agencies the option to offer an uninterrupted term appointment of up to ten years. This longer-term appointment may also assist agencies in recruiting individuals with specialized knowledge who may find opportunities to work on a project-by-project basis more attractive than the job duties of permanent positions. OPM encourages agencies to explore the use of recruitment, relocation, and retention incentives under 5 U.S.C. 5753 and 5754 and 5 CFR part 575, subparts A-C; the General Schedule superior qualifications and special needs pay-setting authority under 5 U.S.C. 5333 and 5 CFR 531.212; or other similar authorities to address staffing difficulties in these term positions where appropriate. For term positions under the General Schedule, agencies may also request that OPM establish or increase special salary rates under 5 U.S.C. 5305 or 5 CFR part 530, subpart C, to address significant or likely significant difficulties in recruiting or retaining well-qualified employees. As previously stated, we do note that, in general, term appointments

are excluded from coverage under the Civil Service Retirement System (CSRS), but, generally, are subject to the Federal Employees Retirement System (FERS).

This commenter also suggested OPM consider granting individuals who serve on term appointments lasting longer than 5 years non-competitive conversion eligibility to a permanent position in the competitive service. OPM is not adopting this suggestion. As noted above, current rules for term appointments do not permit this, and only the Congress, or the President by executive order, can establish non-competitive entry into the competitive service.

This commenter noted that its recruitment files are destroyed after 3 years and expressed concern that no record of these appointments would exist after that time. To remedy this, the agency recommended that the length of a potential extension under these provisions (within the overall 10-year limitation on appointment) be added to the employee's SF-50 as a remark, or that employees should be required to sign a separate statement of understanding to memorialize these term appointments. OPM recommends agencies maintain separate recruitment files for the entire time an individual is employed under a 10-year term appointment in order to satisfy any internal or OPM agency audit requirements. As explained above, OPM will be issuing guidance pertaining to the new coding for purposes of documenting these term appointments.

The same commenter asked OPM to define the terms "specific statutory appropriation" and "specific Congressional appropriation" as used in proposed 5 CFR 316.301(c). This comment is no longer relevant in light of OPM's determination to limit the 10-year term authority to certain STEM-related positions and not extend it to positions needed to stand-up, operate, and close out time-limited organizations which have a specific statutory appropriation; or to time-limited projects which have been funded through specific congressional appropriation.

Two Federal employee unions raised several objections and concerns with this rule. A discussion of these comments follows.

One Federal employee union commented that the proposed rule is unnecessary and counter to good public policy. The organization believes current rules allow for 4-year

extensions, and that OPM has not made a case for these 10-year term appointments. This organization also commented that, “[a] 10-year term is a career position from a practical perspective. Federal employees vest at 5 years, as a consequence not providing full labor protections for employees for up to 10 years does not make good policy.” OPM disagrees with these statements. We believe this authority constitutes good public policy in that these appointments avoid an unnecessary administrative burden on agencies from having to request an extension from OPM during the 10-year period and thus helps to avoid any uncertainty among term employees as to whether their employment will continue through the life cycle of the project work for which they were hired. Additionally, this authority meets the staffing needs of projects requiring certain STEM-related skills known in advance to exceed 4 years and foreseeably require a 10- year period. Finally, employees on term appointments are not precluded from being included in bargaining units and represented by labor unions. As a reminder, there will be robust OPM oversight regarding the use of this 10-year term hiring authority. We have also clarified the limits associated with making a term appointment for certain STEM-related occupations for up to 10 years; and if agencies discover good candidates are not interested in a 10-year term appointment, OPM expects agencies will return to permanent competitive hiring procedures for these occupations.

This organization also commented that this authority has the potential of doing away with the merit system in hiring practices, and that it does away with veterans’ preference in hiring. These statements are incorrect. Positions filled through this authority are filled in the same manner as existing (i.e., 4 year) term appointments: by using competitive hiring procedures (which include the application of veterans’ preference) in 5 CFR part 332, or noncompetitively in accordance with 5 CFR 316.302(b).

This organization also commented that, “the Burning Glass Technologies study does not point to any instances of unmet needs based on current lengths of term appointments. The study does assert the 10-year term will grant more flexibility but it does not prove this flexibility will

be effective in recruiting higher quality personnel.” OPM believes giving agencies the flexibility to appoint individuals for durations commensurate with the work of the position to be filled will increase the pool of talented job applicants. This flexibility is necessary because agencies have reported to OPM that employees have left existing term positions due to uncertainty over whether the position will be extended. The purpose of these rules is to provide a flexibility to agencies faced with staffing certain project-related work, which, from the outset, is expected to last over 4 years and foreseeably could require up to 10 years.

This organization stated this concept has no practical benefit, noting there have not been any complaints by agencies that the 4-year term is insufficient to recruit the talent needed. During the comment period of this proposed rule, OPM received support from several agencies for making a term appointment for up to 10-years for certain STEM-related project work. OPM disagrees that there is no practical benefit to this authority. This authority relieves agencies of the administrative burden of having to request an extension from OPM for work known at the outset to continue beyond 4 years. It also allays uncertainty that employees might otherwise have about their status/prospects for continued employment while an extension request is under review. Finally, agencies have reported that the absence of a 10-year term authority has led to using contractors, rather than hiring employees, for projects that will last longer than 4 years. We anticipate that the 10-year term appointment authority will result in more employees being hired, rather than contractors.

Lastly, this organization commented that the proposed rule will significantly undermine labor protections. This entity stated extending term appointments out to 10 years will give supervisors unprecedented authority and practically eliminate any protections for workers. OPM neither agrees with nor understands the context of this comment. Individuals serving on 10-year term appointments will have the same job protections as current term employees. The job protections for individuals serving on a 10-year term include: appeal rights after completing a one-year trial period; and the same reduction-in-force (RIF) protections as other term employees

(i.e., being placed in the same tenure group as other term employees for purposes of retention standing pursuant to 5 CFR 351, subpart E). OPM did not propose any changes to employee protections with respect to this rulemaking.

A different Federal Employee Union also expressed several objections and concerns with this rule. The organization commented that long-term appointments undermine competitive selection principles and would deprive term employees of deserved benefits and job security. OPM disagrees, noting the selection process is the same process used for traditional term appointments. Agencies fill these positions using competitive hiring procedures (which include the application of veterans' preference) in accordance with 5 CFR part 332, or noncompetitively in accordance with 5 CFR 316.302(b). Further, by its nature, this term appointment does not displace permanent positions.

The organization stated this term appointment authority does nothing to prevent agency abuse and affords agencies more opportunities to avoid hiring permanent employees. OPM disagrees. As noted in the previous response, agencies fill positions under this authority in the same manner as traditional term appointments. In addition, positions filled under this authority are subject to the same oversight and accountability requirements as are other term appointments. OPM reminds readers that the decision to fill a position on either a permanent or time-limited basis depends upon the nature of the work to be performed (including the length of time the agency expects the work to be completed). Agencies should not use this authority to fill positions for which the need for an employee's services are permanent. Lastly, as noted above, we have constrained use of this authority to the specifically identified STEM-related occupations. Consistent with 5 CFR 316.301(a), a term appointment is appropriate when the need for an employee's services is not permanent. This authority cannot be used simply to avoid hiring permanent employees. OPM will evaluate agency usage of the authority and consider any modifications that may be necessary.

The organization commented that the Federal Government should not be expanding its use of these limited employment opportunities that do not provide additional benefits and offer only limited career advancement possibilities. The organization further noted that these limited employment opportunities provide employees with no additional standing when an individual in one of these appointments applies for a full-time position. OPM disagrees with this organization's view that OPM should not be expanding these limited employment opportunities. This delegated authority was created to address agency hiring needs for specific, time-limited projects expected to last longer than traditional term appointments (i.e., 4 years), but also do not require permanent employees.

This organization also commented that extending the current term appointment limitation of up to 4 years to the proposed 10 years without more benefits is thus unlikely to make Federal employment more attractive to highly qualified individuals. OPM disagrees. The commenter provides no evidence that the availability of this 10-year term appointment for certain time-limited projects would negatively influence the perception of Federal employment among "highly qualified" individuals. These appointments offer certain highly qualified individuals an opportunity that permanent employment would not provide. We also note that term employees are eligible to receive health insurance and life insurance, participate in the Thrift Savings Plan (TSP), and earn paid leave and General Schedule within-grade increases, and that time spent as a term employee may be creditable towards Federal retirement under certain circumstances. For additional information pertaining to Federal retirement coverage and eligibility, please see <https://www.opm.gov/retirement-services/>.

The organization also remarked that employees hired for a term appointment do not have higher standing when compared to outside applicants when applying for a permanent position. OPM acknowledges that term employment under this subpart does not lead to non-competitive conversion to a permanent job in the competitive service. OPM notes, however, that individuals

may use the experience they acquire under this authority to qualify for permanent positions and that such experience may help them better compete when applying for a permanent job.

The organization stated that: (1) this change creates a disposable workforce for up to 10 years; (2) the practical effect of this change is that it prolongs the period agencies can reap the benefits of the services of term employees while retaining the ability to abruptly terminate those appointments after an allocated time period; and (3) that this is at odds with OPM's statement that it does not intend this change to be a substitute for a permanent workforce or for appointing employees to permanent positions for work of a permanent nature. OPM disagrees. As we previously noted, this authority is for work of a time-limited nature, i.e., situations for which the need for an employee's services is not permanent. OPM is simply creating a category of term appointment for which agencies already have, in appropriate circumstances, permission to retain the appointee for up to ten years without seeking OPM approval. OPM expects agencies to continue to fill positions on a permanent basis when the nature of the work to be performed requires an employee's services permanently.

The organization also commented that this change will make agencies much less competitive with the private sector. It stated that without affording these employees the ability to appeal the end of their appointment or confer competitive status, these employees will continue to lack job security under this streamlined approach to termination. OPM disagrees. As described above, the 10-year appointment provides the opportunity to perform work that is strictly of a non-permanent nature, which, by definition, neither provides permanent employment nor displaces permanent employees. Further, the 10-year appointment rule gives agencies a flexibility to compete with the private sector that they do not currently have. We believe the prospect of employment for up to 10 years (versus the uncertainty of waiting for an extension request to be approved) will enable agencies to attract interested individuals and thus make the Federal Government more competitive for work which is strictly of a non-permanent duration. We also note that individuals hired under this authority will have the same appeal rights as

traditional term employees, with respect to the balance of the stated term. In accordance with 5 CFR 316.303(b), no term employee has the right to appeal or otherwise remain on an agency's rolls beyond the expiration date of his or her term appointment. In other words, a term employee would not have adverse action procedural rights if the employee's employment terminates because the term appointment has expired. However, if a term employee has completed the one-year trial period, the employee must be provided adverse action procedural rights if the agency seeks to take an adverse action, such as a removal action, after the completion of the trial period and prior to the expiration date of the term appointment.

This organization also commented that private sector employees in STEM-related positions receive better compensation than employees in STEM-related positions in the Federal Government, so increasing recruitment incentives or special pay authority would be a better way for the Federal government to attract and keep employees. This does not take into account that these appointments are for projects of a limited duration. Compensation for time-limited positions is beyond the scope of this rulemaking. As previously discussed in this Supplementary Information, OPM encourages agencies to explore the use of available pay flexibilities to address staffing difficulties, such as recruitment and retention incentives, where appropriate and to the extent practicable.

This organization disagrees with the premise that extensions of up to ten years for term appointments is an effective recruitment tool to enable the Federal Government to compete with the private sector for applicants with needed STEM-related skills. (This entity disagrees with the reports cited: *STEM Careers and the Changing Skill Requirements of Work*, *The National Bureau of Economic Research* (Revised June 2019) and *Can STEM Qualifications Hold The Key To The Future Of Cybersecurity?* (Forbes September 11, 2019)). This organization stated there has been no showing that, in the current economic environment, there is a need for agencies to extend the length of term appointments for such a significant period of time or that such a change will help agencies attract and retain STEM-related talent. As OPM previously noted, this

authority is intended to address situations for which the work to be performed is of a time-limited nature, i.e., situations for which the need for an employee's services is not permanent. OPM believes that in these circumstances, allowing agencies to make term appointments for the duration of the project work (up to 10 years) is a better alternative (and will enhance recruitment efforts for these positions) than requiring individuals to reapply/compete after 4 years or rely on the employing agency to request and receive an extension from OPM or requiring agencies to use contractor personnel.

This organization commented that a better recruitment tool for the Federal Government to pursue would be to grant a special pay authority to match the salaries of those in the private sector and offer other recruitment incentives such as: telework, health benefits, and competitive status. Agencies already have the authority to approve a recruitment incentive without OPM approval for payments of up to 25 percent of an employee's annual rate of basic pay times the number of years in a service agreement (not to exceed 4 years or 100 percent of annual basic pay). OPM encourages agencies to use all recruitment incentives available to them to the extent feasible and appropriate. We also note that higher pay does not address the fact that the work to be performed under this authority is not permanent; it is of a time-limited nature.

The organization also stated that in the event of a reduction in force (RIF), term employees would be in the first group to lose their employment status. OPM agrees and notes the same is true for term employees serving for any duration (including traditional 4-year term appointments). In both instances, term employees will be included in the same tenure group as other term employees for purposes of retention standing pursuant to 5 CFR part 351, subpart E.

This organization commented that OPM does not provide any evidence to support its position that these time-limited projects often last longer than 4 years, or to support the additional six years. Without evidence to support that rationale, this organization has concerns with extending these appointments up to 10 years when the current regulation affords agencies the opportunity to extend beyond four years only when the extension "is clearly justified and is

consistent with applicable statutory provisions.” 5 C.F.R. 316.301(b). OPM disagrees with this assertion, noting that we cited several studies in the proposed rule (85 FR 178) indicating agencies will need the flexibility and agility to attract and retain talent, for a significant period of time, with up-to-date knowledge and training in STEM-related fields for time-limited projects. Moreover, contrary to the commenter’s suggestion, the 10-year term appointment is not simply a longer version of the 4-year term appointment and does not lend itself to supplanting permanent employees.

This organization also commented that the current limitation on term appointments which requires justification for an extension shows the proper respect for competitive selection processes, which should be used to fill long term positions. The organization contended that OPM did not provide any analysis regarding how often extensions are currently granted and/or whether the time-limited projects were completed during these extensions. Further, it contended that agencies are already in the position to determine whether an appointment is needed beyond the 4-year term, subject to approval by OPM. It concluded that this change does no more than provide agencies the authority to abuse the term appointment system without any business justification. OPM disagrees, noting that positions filled under this authority are subject to the same appointment procedures as other term appointments, including public notice and a statement in the job announcement that the position may be extended by the agency for up to 10 years. The only difference is that the duration of the appointment is longer based on the nature of the project to be performed.

This organization also stated the lack of oversight to the change encourages agencies to abuse the term appointment system. OPM disagrees with this assertion. When using this authority agencies are required to adhere to Merit System Principles and follow the same recruitment and selection procedures as they do when making traditional (i.e., 4 year) term appointments. OPM’s Merit System Accountability and Compliance (MSAC) will conduct oversight of this proposed 10-year term hiring authority for certain STEM-related occupations

when conducting its agency accountability audits and will decide the process, factors involved, and the timing as to when the reviews will take place for each agency. In addition, EHRI data will allow OPM to review the number of term appointments made to the positions covered by this rule.

The same organization commented that OPM did not provide any detail as to how it intends to execute this oversight with regard to this authority. It added that without clear guidance on OPM's oversight procedures, this entity has concerns with agencies' authority to utilize the 10-year appointment without seeking OPM approval. As OPM noted in the previous response we will conduct the same oversight with respect to this authority as we do with respect to traditional 4-year term appointments.

This organization expressed concerns that a 10-year appointment could be extended and that agencies will misapply the regulation and continuously move employees to new time-limited projects without job security. This entity noted that pursuant to 5 CFR 335.102(e), agencies may promote, demote, or reassign a term employee serving on a given project to another position within the project, which the agency has been authorized to fill by term appointment. OPM disagrees. The authority to promote, demote, or reassign a term employee as described in 5 CFR 335.102(e) is limited to other positions within the project. The authority to reassign an employee to another position within the project, per 5 CFR part 335, does not constitute authority to extend a term appointment. Moreover, the specific requirements for STEM-related skills suitable for a particular project make it unlikely that an employee appointed under this authority may be moved at will from project to project simply to avoid providing the employee with job security.

This organization also commented that this rule will result in agencies losing institutional knowledge acquired, applied, and passed on by permanent employees as agencies rely more heavily on short-term employees. As an initial matter, agencies regularly balance the trade-offs between term and permanent appointment. Term appointments under this authority are only appropriate for work that is time-limited, not permanent (i.e., the need for an employee's services

is not permanent). The decision to use this authority will thus depend on the specific nature of the work to be performed and how the agency balances the trade-offs between term and permanent employees. OPM encourages agencies to engage in strategic workforce planning and knowledge transfer/management (which may include leaving documentary materials in various media) when practicable and necessary to ensure maintenance of institutional knowledge.

Lastly, this organization requests that OPM strongly consider the impact of this change on the full-time permanent employee workforce and the loss of institutional knowledge. The organization commented that appointment of term employees for much longer periods will likely reduce the number of full-time employees with institutional knowledge, as those who possess it reach the stage of retirement and there are an insufficient number of permanent employees in line to take over. OPM does not agree that the appointment authority will have that impact. By its nature, this authority applies when particular expertise in STEM-related fields is needed for a defined project, but not on an ongoing basis once the project is completed. Should that skillset be needed again, this authority will enable the agency to seek candidates with up-to-date skills in the required STEM-related discipline. We also expect agencies will use it to bring on Federal employees to perform STEM-related project work that is currently being performed or in the future would be performed by contractors. Nonetheless, we intend to evaluate agency use of the authority and to make any adjustments that would advance the efficiency of the service.

While OPM offers the specific responses noted above to the unions' comments, we take seriously their concerns, and therefore in the final rule have decided to limit this 10-year term authority to the STEM-related positions for which agencies have indicated the highest demand.

Expected Impact of This Final Rule

A. Statement of Need

OPM is issuing the final rule to delegate its existing authority to authorize terms of longer than 4 years and up to 10 years to agencies for STEM-related occupations. OPM has been

evaluating its transactional activities to determine which can be delegated to agencies and evaluated through OPM's oversight authority rather than requiring OPM approval in advance. We have sought agency input on which transactional activities to delegate, and multiple agencies have expressed an interest in having delegated authority to appoint employees to terms of longer than 4 years and up to 10 years, particularly for STEM-related projects, which can be long-running but not permanent. After extensive consideration and review, OPM has determined that granting this authority for the STEM-related occupations identified in the final rule is appropriate, and that agency use of this delegated authority can be evaluated through OPM's normal oversight activities.

This new authority will provide agencies with the flexibility to staff foreseeably long-term project work of a STEM-related nature when the need for the work is not permanent but is expected to last longer than 4 years. This new longer term appointment hiring authority will assist agencies in recruiting and retaining individuals with certain specialized STEM-related knowledge and experience. OPM is finalizing this rule because it recognizes that the work performed by STEM-related positions often lasts longer than 4 years. For example, it may be cyclical and often project based (e.g., developing a research concept, initial research to prove feasibility, and testing/evaluation) and must continue until the goal or purpose of the work has been accomplished. Such work may include, but is not limited to, the need to collect data or conduct research (including medical research) regarding a certain trend or phenomenon, sometimes over time; perform technical or professional analysis of this data or research; and prepare reports of findings and recommendations, based on the data and analysis; or develop and implement new Information Technology (IT) projects or programs. In some instances, the work performed by these individuals may be affected by environmental factors or other external circumstances beyond the agency's control, which may result in the need for a lengthier appointment.

OPM has narrowed the scope of the final rule from what was proposed to the positions listed in the Supplemental Information. OPM has determined that the justification for delegating its authority to agencies for the longer term appointments is strongest with respect to STEM-related occupations needed for projects which require longer durations on a government basis. OPM retains authority to approve longer-term appointments for other positions not contained within the scope of this final rule. That authority has been little used historically. We will be updating our guidance on use of this authority so that agencies are aware of the ability to ask OPM to approve longer terms for occupations not included in this rule. We will continue to evaluate the scope of the delegation and consider any adjustments to the occupations covered based on that evaluation.

This formulation is based on discussions with Chief Human Capital Officers, our review of public comments, interagency comments on the draft final rule, and OPM's view that the final rule should have guardrails in place to ensure use of this flexibility does not impact permanent work or employees needed to perform work a permanent nature.

B. Impact

This regulation will provide agencies a streamlined ability to attract and retain talent, for a longer period of time, with up-to-date knowledge and training in STEM-related fields for time-limited projects. This regulation will also allow agencies to hire new STEM-related personnel and grant their own extension of the term appointments, if initially hired for less than 10 years, to allow agencies the ability to shape their workforce with greater agility to adjust to current and emerging mission needs.

OPM has reviewed historical usage of four-year term appointments for STEM-related occupations. Over the last five fiscal years, approximately 36,688 appointments have been made in the STEM-related occupations covered by this final rule. Of those STEM-related appointments, approximately 13,840 (over 37%) were extended beyond the four-year term. These data suggest that there is need for this ten-year term authority and support our decision to

scope this delegation of authority to agencies to appoint individuals for terms of up to 10 years to the STEM-related occupations covered in the final rule.

The impact of this rule will be an important new workforce planning tool which will help agencies better compete for certain STEM-related talent and retain that talent throughout the lifecycle of increasingly longer STEM-related projects.

C. Regulatory Alternatives

The regulatory alternative to this final rule is the option of not regulating. Current regulations at 5 CFR 316.301(b) allow agencies to request from OPM the authority to extend a term appointment beyond the four-year limitation, or to make initial term appointments in excess of four years when justified. Alternatively, agencies could rely on Federal contractors to perform this work. For certain STEM-related work agencies expect to last longer than four years, the current rule is cumbersome and may prove to be a disincentive to recruitment and retention of individuals needed for this work. The Federal procurement process can be lengthy and expensive. Affording agencies with the option to make longer term appointments pursuant to the final rule in lieu of contract support will allow the agency to have STEM-related talent throughout the life cycle of a time-limited project. In addition, this regulation may help agencies better compete for STEM-related talent because Federal term employment will offer individuals more job security and benefits (e.g., health insurance, life insurance and participation in the Thrift Savings Plan (TSP)) than would contract work to individuals interested in working on special projects in order to keep abreast of new technology and enhance their skills. Currently, agencies must seek OPM approval for term appointments which last more than 4 years. For this type of work agencies are faced with greater challenges if they are not able to continue to employ certain individuals with the specific STEM-related knowledge and experience required for the time-limited work. This final rule will provide agencies with greater flexibility when making term appointments for certain STEM-related work and projects.

D. Costs

OPM anticipates the costs of the final rule will be less than the costs of using other alternatives. Costs associated with the final rule are minimal and include: the costs associated with internal agency approval processes to approve an extension pursuant to the final rule up to ten years duration, and the usual learning curve of implementing a regulatory change. To help minimize these costs, OPM intends to issue supplemental explanatory guidance as well as provide technical assistance upon request to any agency which may require such assistance. Because agency skill levels and internal processes vary, OPM cannot monetize the costs of providing this flexibility to agencies.

The costs associated with the regulatory alternative, i.e., relying on existing rules and/or Federal contractors, would be greater than the costs associated with implementing the final rule. Under current rules, agencies would be required to request OPM approval to make initial term appointments in excess of four years for STEM-related work. This process requires additional staff resources (for preparation, review, and approval) from both the requesting agency and OPM than would otherwise be the case with the final rule (the final rule would eliminate costs associated with this step). If an agency sought to make a 4- year appointment and request an extension from OPM as needed, both agencies would incur similar costs (for preparation, review, and approval) to those associated with a request pursuant to 5 CFR 316.301(b). The final rule would eliminate these costs as well. OPM cannot monetize these costs as they may vary across agencies.

The costs associated with relying on contractors to perform this STEM-related work present an additional obstacle for agencies. The use of contractors requires an agency to invoke non-human resources staff to prepare, issue, and navigate the Federal procurement process. This will add additional staff time and expenses to the process of obtaining STEM-related talent that agencies would otherwise would not incur if using the final rule. Using the contracting/procurement process represents an additional layer that adds a hidden cost in the form of time delays which will negatively impact agencies' ability to attract this in-demand

talent and delay agencies' ability to meet current and emerging mission needs. OPM cannot quantify these hidden costs because procurement expertise and processes vary across agencies.

E. Benefits

The benefits of the final rule are many and will be realized by both the agencies and the employees recruited under these provisions. The final rule streamlines the process through which agencies can obtain needed STEM-related employees for work of a non-permanent nature. It does this by eliminating one and/or two steps agencies would otherwise be required to follow: requesting and obtaining OPM approval to make initial term appointments in excess of four years, and the requirement for agencies to obtain OPM approval to extend a term appointment beyond the 4-year time limit. This flexibility reduces the time to fill time-limited STEM-related positions as well as the administrative costs incurred by agencies and OPM associated with these approval processes (i.e., preparation, review, and approval). This will make agencies more competitive in their quest for STEM-related talent by providing them the flexibility and agility needed to better attract and retain talent, for a significant period of time, with in-demand, up-to-date knowledge and training in the STEM-related fields. The final rule will provide agencies with greater flexibility when making longer term appointments for positions involving STEM-related work and/or projects. The final rule will save agencies from the time and expense associated with utilizing contractors to perform STEM-related work covered by these provisions. This will also support agencies with their mission/service-delivery by minimizing turnover or staff transition on time-limited STEM-related projects which supports continuity and on-time delivery of mission requirements.

Individuals hired under these provisions would benefit as well. As federal employees these individuals would have more job security, employee protections, opportunities for advancement via promotion, opportunities for supervisory work, and access to benefits (e.g., health insurance, life insurance and participation in the Thrift Savings Plan (TSP)) than would be the case if hired as contractors to work on special projects. By providing uninterrupted

employment for up to 10 years, this flexibility will lessen the likelihood that a time-limited employee appointed under the current rules will leave an existing term position due to uncertainty over whether the position will be extended. This outcome promotes retention of these employees which leads to continuity during project work and thus benefits both agencies and employees alike.

F. List of Studies Considered

Data from Employment analytics firm Burning Glass Technologies (BGT).

“STEM Careers and the Changing Skill Requirements of Work.” Deming, David J.; Noray, Kadeem L, The National Bureau of Economic Research, Revised June 2019.

“Can STEM Qualifications Hold The Key To The Future Of Cybersecurity?” Feiman, Joseph, (Forbes September 11, 2019),..

Executive Order 12866

Executive Order 12866 Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). In accordance with the provisions of Executive Order 12866, this rule was reviewed by the Office of Management and Budget as a significant, but not economically significant rule.

Regulatory Flexibility Act

The Director of the Office of Personnel Management certifies that this regulation will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies and employees.

Federalism

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles, and responsibilities of State, local, or tribal governments.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million or more in any year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act or CRA) (5 U.S.C. 801 et seq.) requires rules to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this rule before its effective date, as required by 5 U.S.C. 801. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this rule is not a major rule as defined by the CRA, 5 U.S.C. 804.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521)

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 316

Employment, Government employees.

Office of Personnel Management.

Stephen Hickman,
Federal Register Liaison.

Accordingly, OPM is amending 5 CFR part 316 as follows:

PART 316 - TEMPORARY AND TERM EMPLOYMENT

1. The authority citation for part 316 is revised to read as follows:

AUTHORITY: 5 U.S.C. 3301, 3302; E.O. 10577, 3 CFR, 1954-1958 COMP., p. 218; 5 CFR 2.2(c).

Subpart C-Term Employment

2. Amend §316.301 by adding paragraph (c) to read as follows:

§ 316.301 Purpose and duration.

* * * * *

(c)(1) An agency may make a term appointment for a period of more than 1 year but not more than 10 years to a covered position defined in (2) when the need for an employee's services is not permanent. An agency may extend an appointment made for more than 1 year but fewer than 10 years up to the 10-year limit in increments determined by the agency. The vacancy announcement must state that the agency has the option of extending a term appointment under this section up to the 10-year limit. No appointment made under this section may last longer than 10 years from the date of the initial appointment.

(2) An agency may make a term appointment for more than 1 year but not more than 10 years to the following positions (as described in OPM's Handbook of Occupational Groups and Series):

- (i) Social Science Series, 0101;
- (ii) Economist Series, 0110;
- (iii) Psychology Series, 0180;
- (iv) Natural Resources Management and Biological Sciences Group (i.e., 0400 group);
- (v) Medical, Hospital, Dental, and Public Health Group (i.e., 0600 group);
- (vi) Engineering and Architecture Group (i.e., 0800 group);

(vii) Physical Science Group (i.e.,1300 group);

(viii) Mathematical Sciences Group (i.e., 1500 group); and

(ix) Information Technology Group (i.e., 2200 group).

3. Amend § 316.302 by revising paragraph (b)(7) to read as follows:

§316.302 Selection of term employees.

* * * * *

(b) * * *

(7) Reappointment on the basis of having left a term appointment prior to serving the 4-year maximum amount of time allowed under the appointment per §316.301(a), the maximum time allowed for an appointment authorized under this paragraph (b), or the 10-year maximum amount of time allowed under §316.301(c). Reappointment must be to a position in the same agency for filling under the original term appointment and for which the individual qualifies. Combined service under the original term appointment and reappointment must not exceed the 4-year limit pursuant to §316.301(a), the maximum time allowed for an appointment authorized under §316.301(b), or the 10-year limit under §316.301(c), as appropriate; or

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